



CALIFORNIA DEPARTMENT OF State Hospitals

NOTICE OF PUBLIC HEARING TO CONSIDER THE PROPOSED AMENDMENTS TO THE PATIENT ELECTRONIC PROPERTY REGULATIONS

California Code of Regulations
Title 9. Rehabilitative and Developmental Services
Division 1. Department of Mental Health
Chapter 16. State Hospital Operations
Article 3. Safety and Security

The Department of State Hospitals (DSH or Department) will conduct a public hearing at the time and place noted below to consider proposed amendments to the Patient Electronic Property Regulation after considering all relevant public comments, objections, and recommendations.

DATE: September 20, 2018

TIME: 2:00 p.m.

LOCATION: California Health and Human Services Agency
Department of State Hospitals
Conference Room 100
1600 9th Street
Sacramento, California 95814

At the hearing, any interested person or his or her representative may, orally or in writing, submit comments relevant to the proposed action described in the Informative Digest. The Department requests, but does not require, that a person who makes an oral comment at the hearing also prepare and submit a written copy of his or her testimony. Furthermore, the Department requests, but does not require, that all written and email statements on this item be filed at least 10 days prior to the hearing, so that Department staff have sufficient time to consider each comment. The Department encourages members of the public to bring any suggestions for modifications to the proposed regulatory action to staff's attention in advance of the hearing.

WRITTEN COMMENT PERIOD AND SUBMITTAL OF COMMENTS

Any interested person or his or her representative may present comments orally or in writing at the hearing and may provide comments by personal delivery, postal mail service, fax, or email submittal before the hearing as described in detail below. The public comment period for this regulatory action will begin on August 3, 2018. For any written comment to be considered, comments not physically submitted at the hearing, must be received by the Department **no later than 5:00 p.m., September 17, 2018.**

Comments sent to persons and/or addresses other than that specified, or received after the date and time specified above, will be included in the record of this proposed regulatory action, but will not be summarized or responded to regardless of the manner of transmission. For consideration, any written comments shall be submitted as follows:

1. By email to DSH.Regulations@dsh.ca.gov. It is requested that all comments, particularly those emailed with attachments, contain the regulation package identifier “**Electronic Property**” in the subject line to facilitate timely identification and review;
2. By fax transmission to (916) 651-3090;
3. By United States Postal Service to:

California Department of State Hospitals
Regulations Unit
Electronic Property
1600 9th Street, Room 410
Sacramento, CA 95814; or
4. Hand-delivered to the address above.

AUTHORITY AND REFERENCE

This regulatory action is proposed under the authority granted to the Department in Welfare and Institutions Code, sections 4005.1, 4011, 4027, 4101 and 4109. This action is proposed to implement, interpret or make specific Welfare and Institutions Code, sections 4005.1, 4027, 4101, 4109 and 7295.

INFORMATIVE DIGEST AND POLICY STATEMENT OVERVIEW PURSUANT TO GOVERNMENT CODE SECTION 11346.5(a)

Sections Affected: The Department proposes to amend section 4350, title 9, California Code of Regulations (CCR).

Existing Laws/Regulations:

Welfare and Institutions Code, section 4005.1, provides that DSH may adopt and enforce rules and regulations necessary to carry out their respective duties.

Welfare and Institutions Code, section 4011, provides that DSH shall have jurisdiction over the execution of the laws relating to care and treatment of persons with mental health disorders under the custody of DSH.

Welfare and Institutions Code, section 4027, provides that DSH may adopt regulations concerning patients’ rights and related procedures applicable to the inpatient treatment of mentally ill offenders and mentally disordered sex offenders.

Welfare and Institutions Code, section 4101, provides that unless specifically authorized by law, all institutions under the jurisdiction of DSH shall be governed by uniform rule and regulation of DSH.

Welfare and Institutions Code, section 4109, provides that DSH has general control and direction of the property and concerns of each state hospital. DSH shall take care of the interests of the hospital according to law, establish bylaws, rules, and regulations as deemed necessary for its internal government, discipline, and management, and maintain effective inspection of the hospital.

Welfare and Institutions Code, section 7295, provides that DSH shall develop a list of items deemed contraband at every state hospital subject to review by the Contraband Committee and Director of State Hospitals every six months. This section defines “contraband” as defined as materials, articles, or goods that a patient is prohibited from having in his or her possession because the materials, articles, or goods present a risk to the safety and security of the facility. This section provides that inclusion on a contraband list does not necessitate regulations but does not address harm to public or ensure a permanent solution.

Section 891, title 9, CCR, provides that patients not committed pursuant to the Laterman-Petris-Short Act (LPS) shall not have access to the internet.

Effect of the Proposed Action

This proposed rulemaking amendment would amend the current California Code of Regulations section 4350 regarding patient electronic property contraband to address technological advances and meet the hospital’s security needs. The proposed amendments would better delineate which electronic devices are prohibited and which are permitted, and under what circumstances. The amendments will also address the technological advances of digital memory storage, specifically USB devices and gaming devices, that are the most prone to permit the storage, download, and transfer of illegal and illicit material. This proposed action would help to minimize or eliminate patient possession of illegal and illicit material that is harmful to a secured mental health treatment environment.

Specific Proposal:

This proposed action will make changes to Division 1, title 9, CCR, as follows:

Amend section 4350. Contraband Electronic Devices with Communication and Internet Capabilities.

- Title: The title of the regulation would be amended to better match the content of the amended regulatory language for simplicity and clarity.
- Subsection (a), would reorganize the current regulatory language to group information into subsections and paragraphs for clarity.

- Subsection (a), paragraph (1), would utilize the language of the current regulation and permit the delineation of examples of prohibited electronic devices with the actual or potential capability to connect to the internet.
- Subparagraph (A), maintains the electronic devices delineated in current regulation, adding tablets, single-board computers and motherboards as devices meeting the same criteria but not known to be an issue at the adoption of the current regulation.
- Subparagraph (B), maintains the device modification language of the current regulation.
- Subsection (a), paragraph (2), would prohibit patient personal possession of digital media recording devices, including but not limited to Compact Discs (CDs), Digital Video Discs (DVDs), and Blu-Ray burners.
- Subsection (a), paragraph (3), would prohibit patient personal possession of voice or visual recording devices.
- Subsection (a), paragraph (4), would prohibit patient personal possession of any items capable of memory storage.
- Subsection (a), paragraph (4), subparagraph (A), prohibits patient possession of any device capable of patient-accessible digital memory or remote memory access.
- Subsection (a), paragraph (4), subparagraph (B), prohibits patient possession of recordable disks.
- Subsection (a), paragraph (4), subparagraph (C), prohibits patient personal possession of USB devices.
- Subsection (a), paragraph (4), subparagraph (D), prohibits patient personal possession of various data storage devices and describes future devices of similar purpose.
- Subsection (a), paragraph (4), subparagraph (E), prohibits patient possession of gaming devices with personally-accessible digital memory, the ability to access the internet, or the ability to play games or other media not proprietary to the device.
- Subsection (a), paragraph (4), subparagraph (F), prohibits patient possession of memory storage and audio/visual items that can be recorded on to store or distribute illegal or illicit material.
- Subsection (b), would delineate electronic items patients are permitted to access when they do not conflict with subsection (a).
- Subsection (b), paragraph (1), limits the number of electronic items patients are permitted and to codify limits set by individual contraband authority currently enforced at a majority of DSH's hospitals for patient space, fire code, and enforcement purposes.
- Subsection (b), paragraph (2), would limit the number of commercially manufactured and unmodified disks immediately accessible to the patients to 30.

- Subsection (b), paragraph (3), also permits tablets or other devices designed for confined individuals through authorized vendors of DSH or California Department of Corrections and Rehabilitation (CDCR).
- Subsection (c), would reiterate Welfare and Institutions Code, section 7295, by permitting the hospitals create a more comprehensive contraband list as appropriate for the safety of the patient population or the hospital.
- Subsection (d), would permit hospitals to make items prohibited from patient possession available on a supervised basis. Subsection (d) also limits any data storage device within access of a patient to be no greater than eight gigabytes (8GB).

Comparable to Federal Law

There are no existing federal regulations or statutes comparable to the proposed regulations to manage electronic devices within a California DSH facility.

Policy Statement Overview/Anticipated Benefits

The objective of the proposed amendments is to implement, regulations pursuant to Welfare and Institutions Code, sections 4005.1, 4027, 4101, and 7295, by expanding prohibitions against patient possession of digital memory devices and certain electronic devices. The regulation would specify what items patients are prohibited from possessing. The regulation will provide for uniform prohibitions statewide, at each DSH state hospital for the welfare of the public, DSH staff, and every DSH patient.

By amending section 4350, title 9, CCR, DSH can better serve the public by enforcing child pornography prohibitions, better serve DSH staff and patients by minimizing threats to safety and security, and better serve the patients of DSH by providing a more therapeutic inpatient environment by better controlling triggers, stimuli, and temptations.

DSH has a legitimate governmental duty in protecting the public, patients, and the functions of the facility while providing treatment to the type of patient populations entrusted to DSH. This interest includes protecting victims of child pornography from possession and distribution of their victimization by our patient population. This interest also includes protecting members of the public and staff from victimization over the internet by our patients, protecting the facility by preventing aerial maps and other information about the facility from being downloaded and distributed, and creating the most therapeutic and secure inpatient hospital setting possible.

Patients inappropriate and illegal use of electronic items is dangerous. For both of our forensic and civilly committed patients, DSH must balance safety and patient rights to property. The dangers to the public, other patients, the staff, and facility outweigh a patient's desire to unlimited access to electronic devices. The ability to enforce safety over patient property access is supported by law (Welf. & Inst. Code, §§ 4011, 4027, 4101, 4109, 7295; Cal Code Regs., tit. 9, § 884) as well as judicial precedent.

Restrictions on electronic devices do not interfere with patient's constitutional rights to communication as they still may use the phone, writing, typing and printing without internet. There is no constitutional right to possess or access an electronic device. Therefore, restricting electronic devices is an appropriate response to the present issues and dangers.

Evaluation of Inconsistency or Incompatibility with Existing State Regulations

During the development of this regulatory action, DSH reviewed the regulations on this topic and concluded that the proposed amendments are neither inconsistent nor incompatible with existing state regulations or statutes. In arriving at this conclusion, DSH reviewed the Welfare and Institutions Code, the Penal Code, and its own regulations in title 9 of the CCR. As provided in Welfare and Institutions Code sections 4011 and 4109, DSH is vested with jurisdiction and supervision over all hospitals as designated in Welfare and Institutions Code section 4100. The scope and content of DSH's regulatory authority is set forth in Welfare and Institutions Code, sections 4005.1, 4027, 4101 and 4109.

MANDATES ON LOCAL AGENCIES OR SCHOOL DISTRICTS

DSH anticipates there will be no fiscal impact to Local Agencies. This proposed regulation would only affect the state hospitals and the patients. The local government would not have an additional role on the enforcement of the regulation.

Mandate Requires State Reimbursement Pursuant to Part 7 (commencing with §17500) of Division 4 of the Government Code: None.

FISCAL IMPACT ESTIMATES

DISCLOSURES REGARDING THE PROPOSED REGULATIONS

Costs to any Local Agency or School District that Requires Reimbursement Pursuant to Part 7, commencing with Section 17500, of Division 4 of the Government Code:
DSH anticipates there will be no fiscal impact to Local Agencies of school Districts.

Fiscal Impact on Public Agencies Including Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State:

DSH anticipates increased costs of hospital security, including overtime, while the regulation is implemented and legal costs to respond to litigation in response to the regulation. Further, DSH anticipates costs of USB devices and other equipment to be used on a supervised check-out basis for patients. DSH may continue to find more illegal content in the existing electronic devices of the patients, completing this search will take more staff time and may require more storage space at the facility to properly search these items. After the regulations have been promulgated, DSH would incur savings as it would be easier to enforce the contraband policy within the facilities and would decrease the need for searches to find contraband devices.

At the time emergency regulations on this issue were adopted in 2010, it was unknown how many digital storage devices patients would submit purporting to contain appropriate material to be transferred to a state-issued data storage device. Prior to transferring the information, DSH would need to review the devices for illegal material. Currently, only 160 patients out of approximately 1300 patients submitted devices containing appropriate material, and the search of these devices is complete. Since the adoption of the emergency regulation, DSH has incurred costs of approximately \$920,000.00. Coalinga State Hospital's implementation costs are estimated to be approximately \$881,700. Patton State Hospital has spent approximately \$2000.00 on implementation by purchasing flash drives. Napa State Hospital's implementation costs are negligible and both Metropolitan and Atascadero State Hospitals had no fiscal impact because implementation of the regulation had no impact. The financial impact to search data storage devices for appropriate material is now expected to be minimal at every hospital. Litigation costs statewide from January 2018 through May 2018 is estimated to be \$35,265.00. DSH is not aware of any other costs/savings to any other public agency. There will be no Costs or Savings in Federal Funding to the State because federal funding is not connected to the use of electronics by individual patients.

Non-Discretionary Costs or Savings Imposed on Local Agencies:

DSH anticipates there will be no fiscal impact to Local Agencies. This proposed regulation would only affect the state hospitals and the patients. The local government would not have an additional role on the enforcement of the regulation.

HOUSING COSTS

In accordance with Government Code Section 11346.5, subdivision (a)(12), the Department has made the initial determination that the proposed regulatory action will not have a significant effect on housing costs. These proposed regulations do not impact housing since they affect only inmates in California Department of Corrections and Rehabilitation custody or individuals committed to the Department and in Department custody.

SIGNIFICANT, STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

There will not be a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

RESULTS OF THE ECONOMIC IMPACT ANALYSIS

Creation or Elimination of Jobs within the State of California:

It has been determined that the proposed action will not affect the creation or elimination of jobs. Instead, it better assists current positions by assisting law enforcement in maintaining a safe environment as well as assisting treatment staff in creating a more therapeutic inpatient setting.

Creation of New Businesses or Elimination of Existing Businesses within the State of California:

It has been determined that the proposed action will not affect the creation of new businesses or the elimination of existing businesses. It only makes adjustments to allowable patient property for safety and therapeutic reasons.

Expansion of Business Currently doing Business within the State of California:

It has been determined that the proposed action will not affect the expansion of businesses currently doing business in California. It only makes adjustments to allowable patient property for safety and therapeutic reasons.

Benefits of the regulation to the Health and Welfare of California Residents:

It has been determined that the proposed action will protect the health, safety, and general welfare of California residents by reducing if not eliminating dangers to the public, patients, and staff generated by unlimited access to electronic devices by Department of State Hospital patients who are housed in secure inpatient mental health facilities. The dangers posed to California residents include:

- The possession and distribution of child pornography, facility area maps, and harmful information on victims, staff, and other patients;
- Access to previous victims and the ability to create new victims through the internet;
- Harm to therapeutic treatment for the possessing patient; and
- Harm to therapeutic treatment environment for surrounding patients or patients encountering images or discussions on triggering topics.

Worker Safety/State's Environment:

It has been determined that the proposed action will positively affect worker safety because it will create a more therapeutic environment, and better control safety concerns and breaches at the hospitals. It has been determined that the proposed action will not affect the State's environment because it has nothing to do with environmental issues.

COST IMPACT ON REPRESENTATIVE PRIVATE PERSON OR BUSINESS

DSH is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance as a result of the proposed action.

EFFECT ON SMALL BUSINESS

There will be no cost impact on small businesses because the proposed regulation only affects individual patients who are in state hospitals.

SPECIFIC TECHNOLOGIES OR EQUIPMENT

The proposed action does not mandate the use of specific technologies or equipment.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5, subdivision (a)(13), the Department must determine that no reasonable alternatives it considered or that has otherwise been identified and brought to its attention would be either more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed regulation, or more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

Set forth below are the alternatives that were considered and the reasons each alternative was rejected:

Alternative: Fully enforce section 4350 without amendment.

Reason for Rejection: The current regulation fails to exempt the hospital and staff from the prohibition on the use of electronics. Enforcing the current section 4350 would eliminate the ability for the hospital and staff to utilize computers and electronic personal safety devices, necessary for a safe and efficient secured inpatient hospital.

Alternative: Prohibit patients from possessing all electronic devices.

Reason for Rejection: While prohibiting patients from possessing all electronic items would eliminate harm created by the devices and subsequent illegal access to the internet, it would also eliminate the ability of the devices to be used for healthy purposes as well. The goal of this proposed action was to eliminate harm while maintaining therapeutic uses of electronics. Thus, a total prohibition was not determined to be a proper balance at this time, creating more burdensome restrictions than necessary on patients and treatment staff.

AGENCY CONTACT PERSONS

Inquiries concerning the substance of the proposed regulatory action may be directed to the agency representatives: Amy Whiting, Manager, Regulations Unit, by telephone at (916) 654-2748 or (designated back up person) Trini Balcazar, Regulations Coordinator, Regulations Unit, by telephone at (916) 562-2824.

AVAILABILITY OF DOCUMENTS

The Department staff has compiled a record for this rulemaking action which includes all the information upon which the proposal is based, including an Initial Statement of Reasons (ISOR) for the proposed regulatory action and the proposed text (the “express terms”) of the regulation. Copies of the proposed regulation text and the ISOR, which includes a summary of the economic and fiscal impacts of the proposal, may be accessed on the Department’s Internet web site listed below or may be obtained from the agency representative to whom non-substantive inquiries concerning the proposed

administrative action may be directed: Trini Balcazar, Regulations Coordinator, Regulations Unit, by telephone at (916) 562-2824.

HEARING PROCEDURES

The public hearing will be conducted in accordance with the California Administrative Procedure Act, Government Code, title 2, division 3, part 1, chapter 3.5 (commencing with § 11340). After holding the public hearing, and considering all timely and relevant comments received, the Department may adopt the proposed regulations substantially as described in this notice. If the Department makes modifications which are sufficiently related to the originally proposed text, exception of grammatical changes, it will make the modified text (with the changes clearly indicated) available to the public for at least 15 days before the Department adopts the regulations as revised. Please send requests for copies of any modified regulations to the attention of the contact person at the address indicated above. The Department will accept written comments on the modified regulations for 15 days after the date on which they are made available.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Upon its completion, Final Statement of Reasons (FSOR) shall be available and copies may be requested from the agency contact persons in this notice or may be accessed on the Department's Internet web site listed below.

INTERNET ACCESS

This notice, the ISOR, the proposed regulation text, and all subsequent regulatory documents, including the FSOR, when completed, are available on the Department's web site for this rulemaking at <http://www.dsh.ca.gov/Publications/Regulations.aspx>.